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639665—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1050

KYLE DAVENPORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the circuit court of appeals.

JURISDICTION

The judgment of the circuit court of appeals affirming petitioner's conviction was entered February 17, 1945 (R. 213). The petition for a writ of certiorari was filed March 19, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court's instruction on the subject of circumstantial evidence constituted reversible error.

STATUTE AND REGULATIONS INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and the Second War Powers Act of March 27, 1942 (56 Stat. 177) (50 U. S. C. App., Supp. III, 633), provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> * * * * *

> (8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Section 1394.8152 of Ration Order 5C, issued by the Office of Price Administration pursuant to the authority of Section 2 (a) (8) of the Act of June 28, 1940, as amended, *supra,* provides (7 F. R. 9135, 9153):

> *Transfers to consumers.*—On and after November 22, 1942, and notwithstanding the terms of any contract, agreement, or commitment, regardless of when made, a dealer or distributor may transfer gasoline to a consumer, and a consumer may accept such transfer of gasoline, only in exchange for valid coupons, except as provided in §§ 1394.8154, 1394.8155, and 1394.8156.

STATEMENT

Petitioner was found guilty (R. 10) after a jury trial in the District Court of the United States for the Middle District of Tennessee on the first three counts of an indictment charging him with violations of the Second War Powers Act (*supra*) and Gasoline Ration Order 5C issued thereunder by the Office of Price Administration, in that he sold and transferred gasoline without receiving, requiring, and accepting in exchange

therefor valid gasoline ration coupons (R. 3–6).[1] Petitioner was sentenced to imprisonment for one year under each of these counts, the sentences to run consecutively, and to pay a fine of $2,000 under each of the first two counts and a fine of $1,000 under the third (R. 10–12). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgment was affirmed (R. 213).

Although the sufficiency of the proof to support petitioner's conviction is not challenged, we set out below a summary of the evidence as an aid to the Court in appraising the question presented by the petition:

Private Chester E. Ruggs testified that between 9 and 10 o'clock on the night of March 19, 1944, he purchased ten gallons of gasoline from petitioner at a Shell service station adjoining the Club Plantation, a road house operated by petitioner (R. 106) on the Murfreesboro Pike near Nashville, Tennessee. For this gasoline he paid $5 and did not tender, nor did petitioner demand, ration coupons in exchange. (R. 28–29, 30–31.) He further testified that two weeks prior to that date and on each of two preceding occasions he had purchased five or ten gallons of gasoline from petitioner at the same price of fifty cents a gallon, and that in each instance, petitioner, who person-

[1] The court directed a verdict of not guilty on the fourth count of the indictment (R. 6–7) on the ground that the Government had failed to prove the date of the offense alleged in that count (R. 193–195).

ally serviced his car, did not ask for or receive coupons from him (R. 29–30, 31–33). Ruggs also testified that on the March 19 occasion he was accompanied by Mrs. Ruby Brent and Miss Louise Thornton and that the latter was with him on the three prior occasions (R. 29, 31, 33). These persons corroborated Ruggs' testimony in regard to these transactions (R. 78–81, 89–90).

Testifying in his own defense, petitioner denied that he ever made any sales of gasoline to Ruggs (R. 108). He testified that in September 1942 he sold his interest in the service station to Gordon Canter, the present operator, who was at that time employed by him, and that after that date he had never put gasoline in anybody's car at the station (R. 106–107, 112). He stated that he operated the Club Plantation next door to the station (R. 106), that he was frequently around the station, in which he kept a safe, locker room, and cigarette machine, and that he paid the station's light and water bills (R. 106–107, 112). In respect of the alleged sale of gasoline to Ruggs on March 19, 1944, petitioner and others testified that he had left the Club Plantation between 7 and 8 p. m. on that date, prior to the time Ruggs had testified the sale was made (R. 107, 115, 119, 131, 136, 173, 178; see also R. 152, 185). Canter testified that petitioner had a key to the back door of the station (R. 154), and that the pay telephone was listed under the name "Davenport's Service Sta-

tion" in the June 1944 Nashville telephone directory (R. 160, 162). It was developed, on cross-examination of petitioner and by the testimony of Gordon Canter, that petitioner carried on a used-car business on a lot adjoining the station and had seven chicken houses in the back that were "all up and down" the place (R. 110, 150). Petitioner explained a statement he had made to an F. B. I. agent on September 25, 1943, that "Canter has a lease on the station and we are in business together," as referring to a whiskey business (R. 113). Petitioner admitted that he "wouldn't know how many times" he had been convicted of crimes, and stated that the "majority" of his convictions had been on liquor charges and that he had once pleaded guilty on a narcotics charge (R. 111).

In the course of his charge to the jury, the trial judge instructed them as follows on the subject of circumstantial evidence (R. 203–205):

> In this case the Government relies both on direct evidence and on circumstantial evidence, and the Court charges you that presentation by the Government of circumstantial evidence is a proper way of making out a case. In many criminal cases it is the only way in which the Government can proceed in making out a case. Criminals are not in the habit, if they can help it, of taking along witnesses to their guilt and crime. Crimes are usually performed in secret, and in a large number of cases

the fact of guilt, if it exists, can only be established by the proof of circumstances. Proving a case by circumstantial evidence is like identifying the criminal by the tracks he left behind. Proving the tracks which show the criminal, these tracks may be very plain and may be very clear, so clear as to leave no reasonable doubt. On the other hand, they may be very weak and very obscure, so weak and obscure as to leave in your minds a reasonable doubt. To use a common illustration, if you are tracking an animal in the snow, or in the earth, that is moderately soft but not tenacious enough to retain an impression, you can know with reasonable certainty if you see a track in the snow or on the ground, whether or not it is a cow track or horse track, that is, if you know those animals and the tracks they leave; but where there is a clear impression, you did not see the animal pass, but yet there is a clear track which identifies the animal and makes you know, as reasonable minded men, that shortly before such an animal passed that way. On the other hand, the track may be very obscure, the ground may be too hard, or so soft that the track has washed out in the soft mud, or it may be obscured by the track of some other animal, and although you know the difference between the track of the horse and a cow, you cannot possibly tell from the track which animal passed that way. So it is in the criminal law, the track which the criminal left if circumstantial evidence is

relied upon, may be so clear and distinct as to point beyond reasonable doubt to his guilt. On the other hand it may be so obscure or faint that it cannot and does not identify the criminal beyond a reasonable doubt.

Further, the rule applying to circumstantial evidence is that the circumstances relied upon must point so unerringly to the guilt of the accused as to exclude every other reasonable hypothesis except the hypothesis of guilt. If they do not do so, or if you believe the circumstances proven to be as consistent with innocence as with guilt, it would be your duty, and you should acquit the defendant.

ARGUMENT

Petitioner's sole contention (Pet. 4, 9–13) is that the first paragraph of the trial judge's instruction concerning the nature and weight to be accorded circumstantial evidence was erroneous and prejudicial; he argues that the instruction "presupposes and assumes an accused at all events, to be a criminal, the only question left to the jury being whether the criminal left sufficiently plain tracks to legally establish his guilt or to identify him as a criminal" (Pet. 10).[2] This contention, we submit, is clearly untenable.

[2] Petitioner also asserts that the instruction was so prejudicial as to warrant review by this Court notwithstanding that his exception at the trial was only to the court's statement "that the Government relies on circumstantial evidence" (R.

The charge as a whole (R. 195–206) fully and fairly covered the issues in the case. At the outset the trial judge summarized the allegations of the indictment (R. 195–196). He then explained the nature of the offenses charged and iterated that before the jury could convict they must find that the prohibited acts were committed "wilfully," which he defined as intentionally and with "evil design" (R. 198–199). After summarizing briefly the evidence pro and con as to each count (R. 199–201), the judge admonished the jury that they were to consider the case only on the evidence admitted at the trial (R. 201). He then explained the concepts of the presumption of innocence and reasonable doubt (R. 202–203). Speaking of the former, he explicitly instructed that the presumption abides with "Every defendant placed on trial

206). In overruling this exception, the trial judge stated that "there are a lot of circumstances in the case," that he had "presented both sides of the question," and that "If there is no circumstantial evidence in the case, the Court assumes the jury won't consider it" (R. 207). While the Government's case in chief rested largely upon the direct evidence of Ruggs and his women companions that petitioner had sold him gasoline without ration coupons, petitioner disputed this and also sought to establish that he had long since sold his interest in the service station. However, on both direct and cross-examination of petitioner and his supporting witnesses, circumstances were developed which indicated that petitioner still retained an interest in the station (see pp. 5–6, *supra*). The trial judge was therefore justified in his view that there were "a lot of circumstances in the case" and in instructing the jury as to the weight to be accorded circumstantial evidence in arriving at their verdict.

on a criminal charge" throughout the jury's deliberations; that the presumption "protects the defendant from a verdict of guilty unless, after the jury has carefully weighed all the evidence in the case and considers it, that evidence satisfies you as to the defendant's guilt, and satisfies you so clearly as to the guilt of the defendant as to leave in your mind no reasonable doubt of its truth." (R. 202.) Then followed the instruction on circumstantial evidence (R. 203–204) of which petitioner complains.

It is apparent from the two opening sentences of the paragraph which petitioner attacks (*supra*, pp. 6–8) that, as in the immediate preceding instructions concerning the presumption of innocence and reasonable doubt, the trial judge was speaking generally of "criminal cases" as a class and that his references in this portion of his instructions to "the criminal" were intended to be descriptive of persons accused of crime; in their context these words could not have been taken as referring to petitioner. Nor did the illustration of tracking an animal, which the judge used, preempt the function of the jury, as petitioner contends, by "assuming" that petitioner was guilty, leaving to the jury only the question whether he had left sufficiently plain "tracks" of his guilt to identify him as "the criminal." That the judge was referring generally only to proof of crime by circumstantial evidence, and not to the particular

case on trial, is apparent from his opening remarks in the paragraph in question, for he stated that in many criminal cases "the fact of guilt, if it exists, can only be established by the proof of circumstances"; and his illustration was obviously and aptly designed to explain to the jury the meaning and nature of circumstantial evidence, and to impress upon them the kind of strong conviction such evidence must carry before they could convict petitioner upon circumstances alone. Particularly in view of the concluding paragraph of the instruction (*supra*, p. 8), which embodied the usual statement of the rule concerning the degree of certainty of guilt required where circumstantial evidence is relied upon, and which petitioner concedes correctly stated the law in this respect (Pet. 14), it can scarcely be said that either the language or the substance of the judge's illustration is susceptible of the inference petitioner attributes to it. Read as a whole, the instructions as to the presumption of innocence, reasonable doubt, and circumstantial evidence, fairly and correctly presented to the jury the applicable legal concepts upon which they were to determine petitioner's guilt or innocence. Cf. *United States* v. *Novick*, 124 F. 2d 107 (C. C. A. 2), certiorari denied, 315 U. S. 813.

CONCLUSION

The decision below is correct, no conflict of decisions is involved, and the case presents no question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945